

WU SHU CHEN (SOLE EXECUTRIX OF THE ESTATE OF GOH
KENG HOW, DECEASED) a

v.

RAJA ZAINAL ABIDIN BIN RAJA HUSSIN & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU b
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[ORIGINATING SUMMONS NO. 24-440-1994]
2 AUGUST 1995

CIVIL PROCEDURE: *Stay of execution pending appeal - Application
thereof - Whether an appeal operates as an automatic stay - Section 73
Courts of Judicature Act 1964, r. 13 Rules of the Court of Appeal 1994* c
- Large sum of money awarded for land acquisition vested in respondent
- Possibility of dissipation - Whether amounting to special circumstances.

This was an application for a stay of execution pending appeal against the d
order of this Court vesting the sum of RM25,892,000 in the respondent, the
sum being the acquisition award of the Land Administrator deposited into Court
by an *ex parte* order dated 24 May 1995. The applicant claimed that the sum
would be dissipated upon release to the respondent but failed to challenge
evidence of the respondent's strong financial standing. e

The issue was whether the applicant had shown special circumstances to
warrant a stay.

Held:

[1] An appeal does not operate automatically as a stay of execution. This is f
clearly borne out by both s. 73 of the Courts of Judicature Act 1964 and
r. 13 of the Rules of the Court of Appeal 1994 which gives the Court
leeway to exercise its judicial discretion within the confines of the law.

[2] The allegations of misdirections in the judgment, that the judgment was g
against the weight of the evidence or that there was no evidence to
support the judgment are not special circumstances on which this Court
will grant a stay. What amounts to special circumstances is a question of
fact and it must be something distinctive and out of the way. The fact
that a large sum of money is involved does not constitute special h
circumstances.

[3] The applicant has failed to establish by affidavit evidence that the i
respondent is insolvent and would not be in a position to reimburse the
sum and to pay damages in the event the applicant succeeds in her appeal.
Therefore the general proposition that the Court will not deprive a
successful party of the fruits of his litigation until an appeal is determined,

- a* unless the successful party can show special circumstances to justify it, must be vigorously applied to the respondent.

[Application dismissed with costs]

Cases referred to:

- b* *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 MLJ 131 **(foll)**
Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors. [1985] 2 MLJ 406 **(foll)**
Monk v. Bartram [1891] 1 QB 346 **(foll)**
Development & Commercial Bank Bhd. v. Che Wan Development Sdn. Bhd. & Ors. [1990] 1 MLJ 12 **(refd)**
- c* *Alloy Automotive Sdn. Bhd. v Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2, [1986] 1 MLJ 382 **(refd)**
Overseas Investment Pte Ltd. v. Anthony William O'Brien & Anor. [1988] 3 MLJ 332 **(refd)**
Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339, [1995] 2 MLJ 287 **(foll)**
- d* *Eng Yam Construction Sdn Bhd v. TAP Properties Sdn. Bhd.* 2 Mallal's Digest (4th Edn, 1994 Reissue) para. 1363 **(foll)**
Serangoon Garden Estate Ltd. v. Ang Keng [1953] MLJ 116 **(foll)**
The Annot Lyle, [1886] 11 PD 114 **(foll)**
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 **(foll)**
- e* *Sungai Way Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors.* [1990] 1 CLJ 148, [1990] 1 MLJ 245 **(foll)**
Hong Leong Finance Bhd v. Hon Hoi Weng & Ors. [1987] 2 MLJ 377 **(foll)**

Legislation referred to:

- f* Courts of Judicature Act 1964, s. 73
Land Acquisition Act 1960, s. 29
Rules of the Court of Appeal 1994, r. 13
- For the applicant - Robert Lazar (Rosita Yeo with him); M/s. Yeo & Co.*
For the first defendant - Wong Kim Fatt (Christina LE Chia with him); M/s. Christina Chia Ng & Partners

g **JUDGMENT**

Abdul Malik Ishak J:

- h* This was an application for a stay of execution of the order made by me on 12 June 1995 pending the disposal of the appeal to the Court of Appeal. In monetary terms, this case chalked up a figure of RM25,892,000 being the acquisition award which the Land Administrator had to deposit in Court vide an *ex parte* order dated 24 May 1995, a move sanctioned by s. 29 of the Land Acquisition Act 1960. By a vesting order made by me, the colossal figure of RM25,892,000 was vested in Raja Zainal Abidin and this was the sore point
- i* which brought about this application.

Madam Wu Shu Chen, the sole executrix of the estate of Goh Keng How, affirmed an affidavit on 8 July 1995 and there, *inter alia*, she voiced her fear that Raia Zainal Abidin will dissipate that sum once that sum was released to him. Mr. Robert Lazar, the learned Counsel for the applicant, pointed out that the appeal was filed on 15 June 1995 an he drew my attention to the merits of the appeal and the special circumstances that ought to warrant a stay.

It is now trite that an appeal does not operate automatically as a stay of execution. This is clearly borne out by both s. 73 of the Courts of Judicature Act 1964 and r. 13 of the Rules of the Court of Appeal 1994. Section 73 of the Courts of Judicature Act 1964 provides that:

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Rule 13 of the Rules of the Court of Appeal 1994 provides that:

An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

The above quoted provisions give a leeway for me to exercise my judicial discretion and that discretion must be exercised within the confines of the law. A concerted attempt was made to show the incorrectness of my decision but this surely, with respect, cannot be construed as a special circumstance. Put in another way, the allegations that there have been misdirections in the judgment, that the judgment was against the weight of the evidence or that there was no evidence to support the judgment as advanced by Mr. Robert Lazar, are not special circumstances on which this Court will grant a stay (*Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 MLJ 131). Even an appeal to the Court of Appeal as contemplated by the applicant cannot constitute a special circumstance; what amounts to special circumstances must be something distinctive and out of the way (*Matang Holdings Bhd. & Ors. v. Dato' Lee San Choon & Ors.* [1985] 2 MLJ 406). In the final analysis, what may amount to special circumstances is certainly a question of fact and it varies from case to case. Lord Esher MR aptly said in *Monk v. Bartram* [1891] 1 QB 346 that:

It is impossible to enumerate all the matters that might be considered to constitute special circumstances; but it may certainly be said that the allegations that there has been a misdirection, that the verdict was against the weight of evidence, or that there was no evidence to support it, are not special circumstances on which the Court will grant a stay of execution.

- a* It was said that the position here was highly volatile. There was no certainty that RM25,892,000 would not be dissipated and this point must be taken into consideration and viewed against the prejudice that might be sustained by Raja Zainal Abidin if the stay was granted (*Development & Commercial Bank v. Che Wan Development Sdn. Bhd. & Ors* [1990] 1 MLJ 12).
- b* By affidavit evidence in encl. 45, Raja Zainal Abidin deposed as to his financial standing and certain details were revealed. All in all, Raja Zainal Abidin established himself as a man of considerable means with substantial assets. The applicant did not challenge the financial standing of Raja Zainal Abidin and neither did the applicant say in her affidavit in encl. 41 that Raja Zainal Abidin was a man of straw. The failure of the applicant to contradict what was deposed to by Raja Zainal Abidin must now be considered to be an admission of the fact that was asserted (*Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd. v. Anthony William O'Brien & Anor.* [1988] 3 MLJ 332; and *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bharu* [1995] 2 MLJ 287).
- c* At any rate, Ms. Christina LE Chia who argued for Raja Zainal Abidin was perfectly right when she submitted that the dissipation of RM25,892,000 in the event the applicant and the second defendant were to win the appeal was not a requirement for the stay. In *Eng Yam Construction Sdn. Bhd. v. TAP Properties Sdn. Bhd.* digested in 2 *Mallal's Digest* (4th Edn., 1994 Reissue) para 1363, the applicant there alleged that the award involved a large sum of money and that if such sum was paid to the respondent, the applicant might not be able to recover it in the event that the action was successful. Abdul Hamid J in dismissing the application held, *inter alia*, that the fact that a large amount of money was involved did not constitute special circumstances.
- d* Mr. Wong Kim Fatt, the learned Counsel for Raja Zainal Abidin, hit the point when he forcefully submitted that the affidavit of the applicant in encl. 41 did not advert to credible or concrete evidence of dissipation of RM25,892,000 in the event that sum was held by Raja Zainal Abidin. The allegation of dissipation of assets was a mere speculation and that cannot be special circumstances, so submitted Mr. Wong Kim Fatt. He next argued that to lock up the money which Raja Zainal Abidin was entitled to must surely be a grave prejudice and, consequently, the stay ought not to be granted. I venture to say that the applicant failed to establish by affidavit evidence that Raja Zainal Abidin is insolvent and therefore would not be in a position to reimburse RM25,892,000 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, I must assume that Raja Zainal Abidin is not insolvent and this assumption is clearly borne out by his affidavit in encl. 45. The general proposition that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it, must be vigorously applied to Raja Zainal Abidin (*Serangoon Garden Estate Ltd. v. Ang Keng* [1953] MLJ 116; *The Annot Lyle* [1886] 11 PD 114; and *Syarikat*
- e*
- f*
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Berpakat v. Lim Kai Kok [1983] 1 MLJ 406). I must say with alacrity that the judgment which I gave on 1 June 1995 was arrived at after anxiously deliberating the lengthy submissions, both oral and written by both parties, and certainly that decision was not made summarily. All the points advanced by both parties were painstakingly considered by me as reflected in the written judgments which have been circulated to all the parties and when seen in this perspective Raja Zainal Abidin ought not to be deprived of the fruits of his litigation (*Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors.* [1987] 2 MLJ 377; *Sungai Way Leasing Sdn. Bhd. v. Kim Leong Timber Sdn. Bhd. & Ors.* [1990] 1 MLJ 245). For the aforesaid reasons, I dismissed encl. 43 with costs.

Reported by Cindy Chan

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